No. 88-452

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TENNECO OIL COMPANY,
Petitioner,

v.

KERN OIL & REFINING COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUPPLEMENTAL BRIEF

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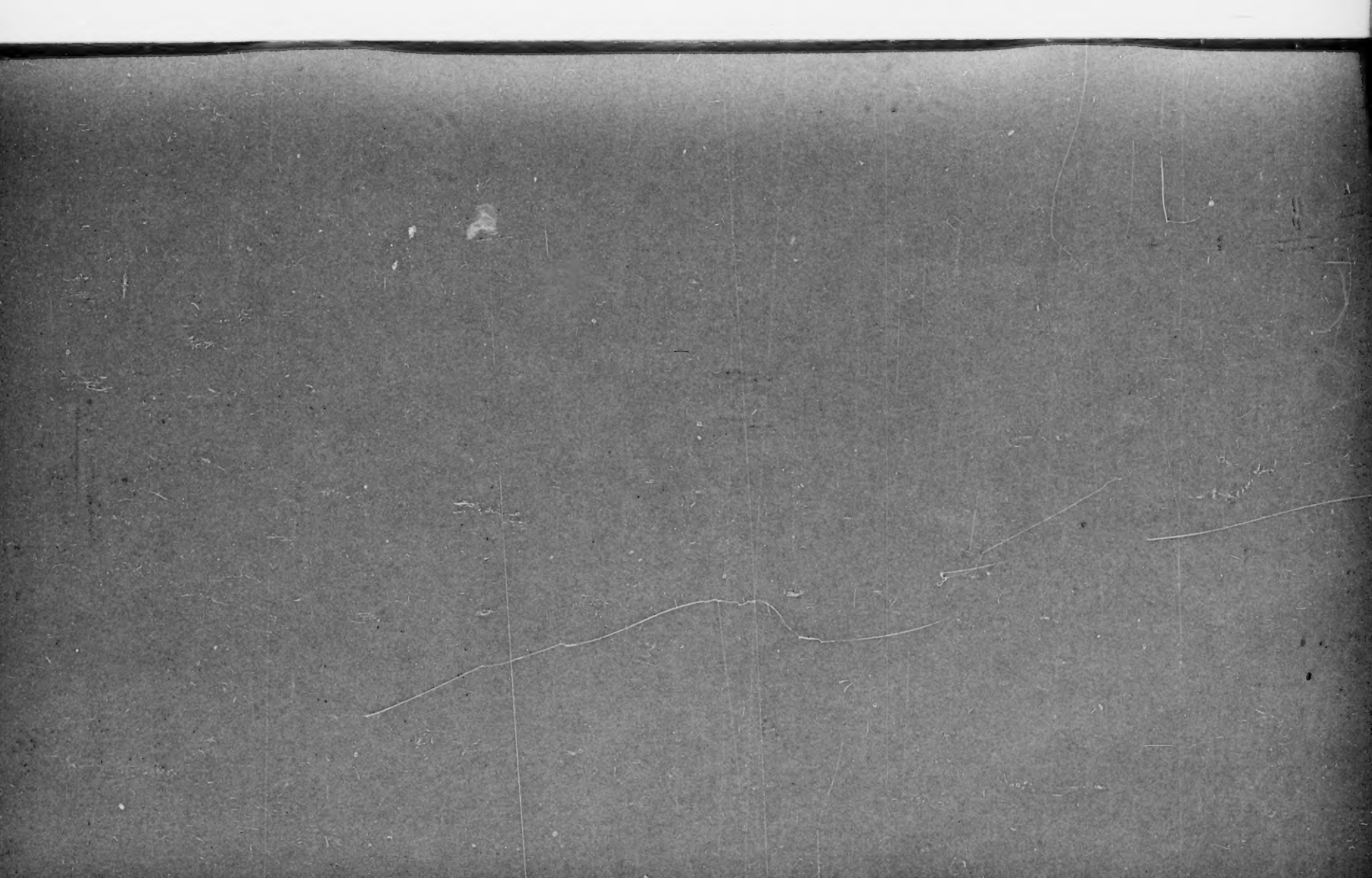

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SUPPLEMENTAL BRIEF [1]

Petitioner Tenneco Oil Company ("Tenneco") submits this brief pursuant to Supreme Court Rule 22.6 to call to the attention of the Court a recent Decision and Order issued by the Department of Energy ("DOE") in connection with that agency's proceeding against respondent Kern Oil & Refining Company ("Kern"). In an Order issued October 18, 1988—which came to Tenneco's attention on October 31, 1988—DOE ruled that three indi-

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[1] The statement required by S. Ct. Rule 28.1 appears at Pet. ii & App. M.

vidual principals of Kern should be joined as respondents in the agency's pending proceeding against Kern. *Decision and Order of the Department of Energy*, KRZ-0522, 0523, 0524 (Oct. 18, 1988).[2] In the course of its new decision, DOE rejected several key contentions on which Kern relies in opposing certiorari before this Court.

In its Petition and Reply Brief herein, Tenneco explained that the rulings of the courts below contravened Tenneco's rights and public policy by barring Tenneco from presenting to DOE evidence of Kern's fraud on that agency. *See* Pet. at 3-8, 16-30; Reply Br. at 4-7. Kern successfully resisted disclosure below by pointing to a DOE audit that found Kern in compliance with the pertinent regulatory program. As the District Court noted in ruling against disclosure, "the Department of Energy made an audit of entitlements compliance * * * and found Kern to be in compliance." Pet. App. 43a. Kern relies on the audit in opposing certiorari, highlighting before this Court the "satisfactory 1981 DOE entitlements audit of Kern in which the DOE had reviewed many (concededly, not all) of the documents Tenneco sought to disclose." Opp. Cert. at 5.

In its new Order, DOE emphasized that "[t]he violations that are here alleged are of a type that is very difficult to detect through a normal audit or by reviewing a firm's reports to the DOE." *Decision and Order*, at 7. The DOE Order confirmed that the facts that led to the agency action against Kern "did not become known to the DOE" until Tenneco was belatedly permitted to disclose the documents uncovered in this litigation, and that Kern "shares responsibility for [the] delay." *Id.* at 7-8 & n.5. As DOE noted:

> Tenneco attempted to bring the relevant facts to the DOE's attention in April 1985. However, Tenneco

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[2] A copy of the Decision and Order is included as an appendix hereto.

> had received this information pursuant to a protective order, and Kern contested Tenneco's attempt to lift the order so that the information could be disclosed to the DOE. [*Id.* at 8 n.5.]

Thus, DOE itself has now refuted Kern's reliance on the audit, and confirmed the significance of the disclosure Tenneco was barred from making for 18 months.

Kern argued below, and argues before this Court, that the Proposed Remedial Order ("PRO") issued against it—based on Tenneco's disclosures—"assigns wrong to transactions that were wholly in compliance with the regulations in effect at the time." Opp. Cert. at 22. The new DOE Order emphatically rejected this suggestion. The Order stated that "any reasonable person familiar with the general requirements of DOE regulations would recognize that tie-in arrangements such as those alleged in the Kern PRO were improper and would violate the regulations," and that Kern's alleged conduct "by its very nature approaches being inherently wrongful * * *." *Id.* at 9.

The District Court relied on a DOE audit of Kern in rejecting Tenneco's arguments at trial; if Tenneco had been able to disclose the documents to DOE that agency would have been able to explain, as it now has, that the violations at issue "are of a type that is very difficult to detect through a normal audit." *Id.* at 7. DOE has also now confirmed that the violations—though difficult for it to detect—were clearly improper and, indeed, "inherently wrongful." *Id.* at 9. Finally, the DOE decision to join the individuals in its proceeding against Kern—including the very individuals who were the key credibility witnesses for Kern below—highlights the prejudice to Tenneco of not permitting disclosure when Tenneco first requested it, eight months before the start of trial. Under such circumstances, the dangers of the rule below—which permits courts to prevent parties from

disclosing evidence of otherwise undetectable fraud to the appropriate governmental authorities—are clear.

The latest DOE Order confirms the need for this Court to grant the writ and reverse the decision below.

Respectfully submitted,

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APPENDIX

APPENDIX

[SEAL]

DEPARTMENT OF ENERGY
Washington, DC 20585

[Oct. 18, 1988]

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Interlocutory Order

Names of Petitioners:	Economic Regulatory Administration Kern Oil & Refining Company
Dates of Filing:	September 17, 1987 October 23, 1987 September 25, 1987
Case Numbers:	KRZ-0522 KRZ-0523 KRZ-0524

This proceeding arises from a Proposed Remedial Order (PRO) that the Economic Regulatory Administration (ERA) issued to Kern Oil & Refining Company (Kern) on March 31, 1987.[1] The PRO alleges that during the audit period from October 1979 through December 1980, Kern engaged in a scheme whereby it sold crude oil certified as lower or upper tier and purchased back the identical volume of crude oil certified as stripper well crude oil at a price below the market price of stripper well crude oil. The PRO alleges that this scheme violated the anti-circumvention provision of DOE regulations, 10 C.F.R. § 205.202, by allowing the firm to evade its entitlements obligations under 10 C.F.R. § 211.67. The PRO contemplates that the firm refund the benefits

[1] For purposes of this Decision, "Kern" also refers to Kern Oil and Refining's predecessors during the audit period.

it received from the scheme, plus interest. Kern filed a Statement of Objections to the PRO on July 10, 1987 (Case No. KRO-0520). On September 17, 1987, the ERA filed a Motion to Amend the PRO to correct erroneous statements concerning the organization structure of Kern, to add an additional theory of liability, and to join Russell B. Newton, Jr., Larry D. Delpit, and Donald M. LeDoux, to this proceeding. The ERA seeks to hold these three individuals jointly and severally liable for Kern's alleged violations. The present Decision considers this Motion as well as an ERA Motion to supplement the record and a Motion by Kern to strike the ERA's Response to its Statement of Objections.

I. *THE ERA's MOTIONS*

DOE procedural regulations state that the ERA may amend a PRO at its discretion prior to filing of a Statement of Objections. 10 C.F.R. § 205.192(e). The regulations are silent, however, with respect to amendments after a Statement of Objection is filed, although 10 C.F.R. § 205.199G gives this Office authority to issue any order necessary to enure that enforcement proceedings are conducted in an appropriate manner. We have held in prior cases that we will under these circumstances consider motions to amend a PRO. *See Hudson Oil Co.*, 11 DOE ¶ 84,001 at 87,002 (1983). In determining whether to allow an amendment, we are guided by several important considerations. First, we note that a PRO is not a final agency determination, but it merely charges that a firm may have violated the regulations. The final determination of whether a violation has occurred and whether a Remedial Order should be issued rests with this Office. The administrative review process before this Office is designed to permit the recipient of a PRO to present arguments and to allow the agency to revise its allegations and correct any errors in the legal and factual analysis of the PRO. *Elm City Filling Stations, Inc.*, 8 DOE

¶ 82,554 at 85,200 (1981). In exercising our responsibility, we may modify the findings of a PRO, or even change the theory on which liability is based, so long as the party to whom the Remedial Order is issued was given a full opportunity to contest such new theories of liability. *See Hudson Oil Co.*, 11 DOE ¶ 84,001 at 87,002 (1983); *Chevron, U.S.A.*, 5 DOE ¶ 83,007 (1980); *Champlin Petroleum Co.*, 4 DOE ¶ 80,101 (1979); *Time Oil Co.*, 3 DOE ¶ 82,512 (1979); 10 C.F.R. § 205.199B(a). *See also* Fed. R. Civ. P. 15(a) (permitting amendments to pleadings at any stage upon showing of good cause). Consequently, we are not precluded from granting a Motion to Amend, or even from making an amendment *sua sponte*, as long as there exists good cause for the amendment, and the amendment will not cause undue prejudice to any party to the proceeding. We also consider any administrative delay that may result from allowing the amendment. *ERA/Gulf Oil Corp.*, 12 DOE ¶ 82,532 at 85,143 (1984); *Getty Oil Co.*, 6 DOE ¶ 82,568 at 85,212 (1980).

A. *Organizational Status of Kern*

According to the ERA, during the audit period, Newton and Delpit owned a corporation with the name Kern County Refinery, Inc. On March 31, 1982, that corporation's stock was sold to a general partnership named Kern Oil & Refining Company, which dissolved Kern County Refinery, Inc. and assumed its assets and liabilities. Thereafter, the assets and liabilities of the partnership were transferred to a new corporation with the same name, Kern Oil & Refining Company. The PRO stated erroneously that Kern is now a partnership. The ERA asks that the PRO be amended to reflect that Kern is now a corporation in order to assure that any Remedial Order is issued to the proper entity.

This portion of the ERA's Motion is unopposed, and we find good cause for granting it. Accordingly, the PRO will be amended to reflect that Kern is a corporation.

B. *Violations Alleged*

The PRO in this case alleges that Kern sold lower and upper tier crude oil in transactions that were "tied" to its purchases of discounted stripper well crude oil. The PRO alleges that these tie-in arrangements violated the anti-circumvention rule which made it a violation to engage in any practice that circumvented or contravened the requirements of any regulation. The ERA seeks to add as an additional allegation that the same Kern transactions also violated the normal business practices rule, 10 C.F.R. § 210.62(c). This provision made it a violation to engage in any practice which constituted a means to obtain a price higher than was permitted by the regulations.

Kern opposes the ERA's attempt to add this additional allegation. The firm maintains that there is not good cause for the amendment because, according to the ERA, the two regulations are substantially the same and overlapping. Kern also contends that it would be subject to an undue burden if the amendment is granted because it has already gone to considerable expense to respond to the present PRO, and if the PRO is amended, it will have to file a new submission.

We find that the ERA's Motion to add the allegation that Kern violated the normal business practices rule to the PRO should be granted. This additional legal theory is not, as Kern asserts, redundant. While there is substantial overlap in the conduct prohibited by the two provisions, they are not identical, and some of the arguments that Kern makes in its Statement of Objections with respect to the anti-circumvention rule are inapplicable to the normal business practices rule.[2] Moreover, the normal

[2] For example, Kern's argument that the anti-circumvention rule is not a substantive regulation because it is included in the procedural regulations is clearly inapplicable to the normal business practices rule.

business practices rule is more specific. It lists some types of prohibited conduct (including inducements, discounts, and tie-in agreements), while the anti-circumvention rule does not. We find that there is good cause for adding the allegation, since the ERA may properly seek fuller consideration of alternative theories of liability arising from the same transactions that are the subject of the PRO.

We also find Kern's argument that it will be prejudiced by this amendment to be without merit. Kern will be allowed to file a supplemental Statement of Objections which addresses the amended allegations. The necessity of filing this additional Statement, while possibly imposing some burden on the firm, does not alone constitute undue prejudice. The additional allegation arises from the same transactions and involves basically the same alleged misconduct. The burden of responding to this added allegation should therefore be minimal. *ERA (Revere Petroleum Corp.)*, 12 DOE ¶ 82,544 at 85,234 (1985). Consequently, we find that the PRO should be amended to add the allegation that Kern violated the normal business practices rule.

In addition, we note that the PRO rests primarily on the position that Kern's conduct in this case allegedly circumvented the firm's entitlements obligations and asserts a refund liability based upon the amount by which the entitlements program was allegedly harmed. Nevertheless, in prior cases involving circumstances which are substantially similar to those alleged here, we have found that tie-in arrangements circumvented the price regulations applicable to the resale of lower and upper tier crude oil and constituted a means of obtaining an excessive price for such crude oil. *See Canal Ref. Co.*, 14 DOE ¶ 83,023 (1986); *Cities Service Oil & Gas Corp.*, 17 DOE ¶ 83,020 (1988). We will specifically consider whether the transactions at issue here circumvented the price regulations on the resale of crude oil as well as the PRO's

primary theory that they circumvented the entitlements regulations, and if the evidence in this case warrants, we may base a final Remedial Order on this theory.

In *Canal* and *Cities*, we found that the measure of liability for circumventing the crude oil reseller price rules was the amount of excessive payments received for the crude oil sales because of the tie-in arrangements, generally the amount of discount on the stripper well crude oil received by the firm. The record in this case contains insufficient evidence of the amount of the discounts to allow us to compute the overcharges if we should find violations and base liability on this theory. Accordingly, we shall direct the ERA to provide computations showing what the amount of Kern's overcharges would be if they were computed in accordance with the method used in those cases.

C. *Joinder of Individuals*

In its September 17, 1987 Motion, the ERA seeks to join Newton, Delpit and LeDoux to the PRO and hold them jointly and severally liable for any Kern overcharges. The ERA argues that it is reasonable to hold them liable for the alleged overcharges because they were the principal figures who participated in and caused the alleged violations, and because they benefited from the violations. The ERA does not seek to hold them liable on a traditional "piercing the corporate veil" theory, but on what has been called the "tortious conduct" theory of liability. This theory of liability is based upon the view that a corporate officer who was a central figure or animating force with respect to regulatory violations may be liable if he benefited from them. In prior cases, we have held that a corporate officer or owner may be held liable under the tortious conduct theory if (i) he exercised control over or participated in the transactions which were in violation of the regulations, and (ii) he personally benefited from the overcharges. *See, e.g., Beta Energy*

Corp., 14 DOE ¶ 83,025 at 86,208-09 (1986); *Doma Corp.*, 13 DOE ¶ 83,027 at 86,236-39 (1985); *AD Energy, Inc.*, 13 DOE ¶ 83,031 at 86,276-78 (1985); *Knox Oil*, 13 DOE ¶ 83,040 at 86,334-39 (1985). We have noted that to fail to impose liability upon corporate officials under these circumstances would allow persons who enriched themselves by violating the regulations to retain the fruits of the violations merely because they took advantage of a corporate shield intended to promote and protect legitimate undertakings.

We have also held on numerous prior occasions that we have authority under 10 C.F.R. § 205.199G to join additional parties to DOE enforcement proceedings. *See, e.g.*, *ERA*, 14 DOE ¶ 82,503 (1986); *ERA (RFB Petroleum, Inc.)*, 12 DOE ¶ 82,529 (1984). As with any motion to amend a PRO subsequent to the filing of a Statement of Objections, the ERA must demonstrate good cause for joinder and must show that joinder will not cause undue prejudice to any party or unduly delay the proceeding. As a rule, joinder is warranted where the case against the party sought to be joined arises from the same regulatory violations as are alleged in the PRO, and is especially appropriate where necessary to ensure that all parties essential to the just and efficient resolution of the case are present before this Office. Since the ERA may always issue a separate PRO to the parties it wishes to join, the standard we have used in evaluating motions to join is whether the ERA has presented enough evidence to make a *prima facie* case of liability sufficient to sustain a PRO under 10 C.F.R. § 205.192A(a). *ERA (RFB Petroleum, Inc.)*, 12 DOE at 85,129. In ruling upon motions to join we are not called on to decide the merits of the case against the parties, but only whether the ERA has presented a *prima facie* case.[3]

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[3] In their Responses to the ERA's Motion to join them, Newton, Delpit and LeDoux have submitted affidavits and other evidence to support their argument that they should not be held liable for

The Respondents have submitted a joint response opposing the ERA's joinder Motion which presents the arguments that they have in common. In addition, each individual Respondent has submitted his own response which deals with his own particular circumstances. We will address the Respondents' general arguments first.

The Respondents argue that the ERA's tortious conduct allegations against them are barred by the three year statute of limitations applicable to actions brought by the United States that are founded upon a tort. 28 U.S.C. § 2415. This is incorrect. Although the ERA's theory of liability is referred to as a "tortious conduct" theory, the liability is not founded on a tort, but upon a regulatory violation. As we have mentioned in prior cases, regulatory violations are not traditional common law torts. *ERA (RFB Petroleum, Inc.)* 12 DOE at 85,136 n.6. The term "tortious conduct" does not mean that the violations are torts, but refers to the fact that corporate owners and officers may be held personally liable for their own conduct in violating DOE regulations in a manner similar to the way that they may be held liable for their own torts. *ERA/Kenneth Walker*, 17 DOE ¶ 83,006 at 86,074 n.19 (1988). Consequently, the stat-

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Kern's alleged violation of DOE regulations. The ERA contends that it was inappropriate for them to submit evidence going to the merits of the case against them at this time, since the ERA will not have an opportunity to seek discovery or submit rebuttal evidence until after the parties are joined to this proceeding. The ERA is correct. In considering motions to join, the focus is on whether, as a matter of law, the ERA has presented a sufficient *prima facie* case. It is not appropriate to weigh the evidence regarding whether they should be held liable at this stage of the proceeding. Thus, while we shall consider the Respondents' arguments as to the legal sufficiency of the ERA's *prima facie* case in considering whether to join them, we will not consider their factual evidence going to the merits of the ERA's case. We shall consider that factual evidence at the appropriate time.

ute of limitations applicable to actions founded on tort is not applicable.[4]

In a related argument, the Respondents contend that this Office does not have jurisdiction to consider "tortious conduct" liability because they claim that only Article III courts have jurisdiction to consider actions based on common law. This argument lacks a factual basis because "tortious conduct" liability does not rest on a common law tort but on a violation of DOE regulations. It is well established that administrative tribunals have the power to adjudicate cases involving "public rights" as distinct from private rights at common law. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67-70 (1982).

The Respondents further claim that joinder should be barred by laches. Laches is an equitable doctrine that may bar a proceeding where there has been unreasonable delay in commencing the proceedings and that delay results in substantial prejudice to the party. *Independent Bankers Ass'n v. Heiman*, 627 F.2d 486 (D.C. Cir. 1980). Laches does not generally lie against the government, and consequently, we have held in previous decisions that we will consider laches only when "the circumstances of the case are so compelling as to require us to disregard the general inapplicability of laches to the government in an effort to undo a grievous wrong." *A. Tarricone, Inc.*, 9 DOE ¶ 83,004 at 86,013 (1981); *Cities Service Oil & Gas Corp.*, 17 DOE ¶ 83,020 (1988).

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[4] Even if the personal liability of corporate officers were deemed to be founded on tort, we find that the general three year statute of limitations applicable to tort actions was superseded by the statute of limitations contained in the Petroleum Overcharge Distribution and Restitution Act of 1986, 15 U.S.C. § 4504, which pertains specifically to violations of DOE regulations. Moreover, 28 U.S.C. § 2416(c) provides that the tort statute of limitations does not run during periods in which the facts material to the right of action are not known and reasonably could not be known by the government. This is the case here. *See* note 5.

The Respondents contend that the long interval between the date of the audit period (beginning October 1979) and the filing of this Motion to Amend (September 1987) constitutes an unwarranted and prejudicial delay. We do not agree. The delay in commencing this proceeding was not unreasonable under the circumstances. The violations that are here alleged are of a type that is very difficult to detect through a normal audit or by reviewing a firm's reports to the DOE. The facts underlying the Kern PRO did not become known to the DOE until October 10, 1986, when Tenneco filed a Petition for Special Redress (Case No. KEG-0001) concerning the transactions.[5] The PRO was issued promptly after the ERA became aware of the alleged violations. Nor have the Respondents demonstrated that they have been substantially prejudiced by the alleged delay. They argue that with the passage of time memories of the circumstances surrounding the transactions have faded and documents may have been lost. Such general allegations, without any supporting evidence, are insufficient to establish prejudice. *Tugalo Gas Co.*, 12 DOE ¶ 83,027 at 86,352 (1985). LeDoux also maintains that he has been prejudiced by the delay because there has been a deterioration in Kern's financial condition. He asserts that if the ERA had brought this proceeding sooner, it might have been able to obtain full restitution from Kern and there would have been no reason to join him. This argument is speculative, and LeDoux has presented no supporting evidence. We therefore find the laches claim to be without merit.[6]

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[5] Tenneco attempted to bring the relevant facts to the DOE's attention in April 1985. However, Tenneco had received this information pursuant to a protective order, and Kern contested Tenneco's attempt to lift the order so that the information could be disclosed to the DOE. Thus, Kern shares responsibility for delay in this case.

[6] Delpit argues that he will be prejudiced by joinder because it would harm his credit standing. This argument lacks merit. Damage resulting from the possibility that a party might have to make

The Respondents also maintain that personal liability based on the tortious conduct theory may be imposed only for knowing or willful violations of DOE regulations. We do not agree. In *Citronelle-Mobile Gathering, Inc. v. Herrington*, 826 F.2d 16, 23-28 (Temp. Emer. Ct. App.), *cert. denied*, 108 S. Ct. 327 (1987), the Temporary Emergency Court of Appeals rejected the contention that personal liability was precluded by a finding that the individual acted in "good faith." The court found that personal liability for corporate violations may attach when the individual's wrongful conduct caused a violation of DOE regulations, even where the violation was not willful. However, the court noted that restitution is a legal remedy and indicated that a finding of personal liability should be based on the particular circumstances and equities of each case. *See also Phoenix Oil Co.*, 17 DOE ¶ 83,019 (1988). Moreover, we believe that any reasonable person familiar with the general requirements of DOE regulations would recognize that tie-in arrangements such as those alleged in the Kern PRO were improper and would violate the regulations. Consequently, the conduct alleged in this case by its very nature approaches being inherently wrongful and would satisfy the higher standards that the Respondents say apply.

The Respondents argue the ERA's Motion is defective because it does not contain a declaration by the DOE employee primarily knowledgeable about the facts of the case that the findings of fact are to the best of his knowledge correct. Such a declaration is required in PROs by 10 C.F.R. § 205.192(d). The Respondents argue that parties that are joined to an ongoing proceeding should have the same procedural rights as the parties to whom the PRO was issued originally, and they argue that this

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a refund of monies to which he was never entitled in the first place does not constitute a type of prejudice that would warrant denial of joinder where the ERA has made a *prima facie* case.

will not be the case if a declaration is not required in the present case.

We agree that joined parties should be afforded the same procedural rights as those to whom a PRO is issued. It does not follow, however, that a new declaration is required whenever the ERA seeks to join additional parties or otherwise amend a PRO. In fact, there is no regulatory requirement that the ERA provide such a declaration in a motion to join or amend, at least where the ERA does not seek to rely to any significant extent on new unsupported factual allegations. *See ERA/Gulf Oil Co.*, 12 DOE ¶ 82,532 at 85,144 (1984).

The Motion in the present case does not advance major new allegations of regulatory violations that might necessitate another declaration. The allegations in the Motion were supported by substantial documentary evidence. As set forth below, this documentary evidence, together with the factual allegations contained in the PRO, is sufficient to make a *prima facie* case of personal liability against the Respondents. The lack of a declaration does not deprive the Respondents of any rights that are available to parties to whom PROs are issued, since we are not relying on any unsupported factual allegations in making this determination.

The Respondents further argue that joinder should be denied in this case because of alleged misconduct on the part of counsel for the ERA. It is undisputed that ERA counsel telephoned LeDoux to obtain information concerning the roles played by Newton and Delpit in the transactions at issue, and that LeDoux declined to provide assistance to the ERA. The Respondents allege that ERA counsel improperly offered LeDoux immunity for testimony to the effect that Newton and Delpit were directly involved in the transactions. Counsel for the ERA has submitted an affidavit in which he states that he did not ask LeDoux for testimony that Newton and Delpit speci-

fically directed the transactions at issue, as alleged by the Respondents.

The Respondents have not shown that the telephone conversation between LeDoux and counsel for the ERA was improper. While there are some discrepancies between the two accounts, such accounts rarely coincide exactly, and the differences may result from a misunderstanding by LeDoux of the ERA's intent. Although ERA counsel may have indicated the testimony that he expected LeDoux to be able to provide, there is no evidence that he wanted that testimony if it was not true. In any event, even if there were something improper with this communication, it would not warrant denial of the joinder requested by the ERA since it is irrelevant to the merits of this case.[7]

Accordingly, the general objections to joinder that have been raised by the Respondents are without merit. We shall now consider whether there is good cause to join each individual in view of their respective roles.

1. Donald M. LeDoux

According to the record, during the audit period, LeDoux was Kern's vice president for crude oil supply. It is undisputed that he was responsible for negotiating and signing all crude oil purchase and sales contracts, including

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[7] LeDoux also maintains that the ERA's motive in seeking to join him to this proceeding is to punish him for not cooperating with the ERA. He argues that this motive is improper. There is no evidence to support this claim. It is clear that the ERA believed that it had a strong case for holding LeDoux personally liable for Kern's overcharges. That the ERA indicated that it might not seek to join LeDoux to the proceeding if he cooperated by providing the ERA with information concerning the participation of others in the alleged wrongful transactions does not imply an improper motive. It is often necessary for the government in prosecuting crimes and civil violations to negotiate with some participants in the wrongful conduct in order to proceed against other participants. This does not make such agreements improper.

the ones that are the subject of the PRO. LeDoux asserts that he relied on the advice of counsel concerning DOE regulatory requirements, and that he never knowingly entered into any contract that violated the regulations. LeDoux states that his total compensation for 1980 was $119,680.

The ERA has clearly made a *prima facie* case with respect to the first prong of the tortious conduct liability test, since it is undisputed that LeDoux personally participated in the transactions allegedly in violation of the regulations. LeDoux strongly asserts, however, that the ERA has not made a *prima facie* case with respect to the second prong, i.e., that he personally benefited from the violations. In this regard, he argues that he was not rewarded specifically for the questioned transactions and that his compensation was in no way tied to Kern's profit from them. He contends that his relatively low compensation during the audit period does not support a finding that he should be held personally liable for any overcharges that are established.

We find that the ERA has made a *prima facie* case that (i) LeDoux benefited from the transactions allegedly in violation of the regulations and (ii) that he should be held personally liable for the resulting overcharges. LeDoux states that his compensation for 1980 consisted of a base salary of $56,680 and a bonus of $63,000. He has submitted evidence that his salary and bonus were comparable to those of the other four Kern vice presidents, and he asserts that his total compensation was in line with that paid to persons with similar responsibilities in other independent refineries. LeDoux assumes that the ERA must show that his compensation was in some way directly tied to specific illegal transactions. This is incorrect. LeDoux admits that the amount of his bonus was based in part upon his job performance and Kern's performance in general. It is clear that Kern's profitability during the audit period would not have been as great had

it not been for the transactions at issue in this case. It is also likely that LeDoux's performance would not have been viewed as favorably if Kern had not made the profits it did from its crude oil transactions. Thus, at least a portion of the bonus LeDoux received appears to be attributable to the violations alleged in the PRO. The relatively small amount by which he benefited from the alleged violations is not relevant to determining whether he should be joined, but will be considered in determining the extent, if any, of his liability.[8] *See Phoenix Oil Co.*, 17 DOE ¶ 83,019 (1988). We therefore find that the ERA's Motion to join him to this proceeding should be granted.

2. Larry D. Delpit

According to the record, Delpit owned one-fourth of Kern and was its Chief Operating Officer. It was he who ran the firm from day-to-day and to whom LeDoux reported. The record indicates that during Kern's fiscal year 1980, Delpit received a salary of $———. In addition, Kern paid a dividend of $——— to its owners on April 22, 1981. The ERA states its belief that one-fourth of this dividend, $——— was received by Delpit, and Delpit has not denied it.

The ERA has clearly made a *prima facie* case that, as an owner of Kern, Delpit benefited from the profits that the firm made by allegedly violating the price regulations. His equity in the company, as well as his salary and

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[8] LeDoux states that his net worth is approximately $620,000 and argues that the ERA's Motion should be denied because he would be unable to pay any significant portion of any refund liability that is imposed on Kern. The extent to which LeDoux has assets able to satisfy any refund obligation that might be imposed is not relevant to determining whether he should be held liable. If his liability is established, the ERA would be entitled to recover from him whatever it could, even though it might be only a small fraction of Kern's total refund liability.

dividend income, would likely have been significantly less had the alleged violations not occurred.

The more difficult issue is whether Delpit either participated in, or authorized, the transactions at issue. The ERA argues that he had substantial control over Kern's crude oil transactions. Delpit states in a transcript submitted by the ERA that "[LeDoux] kept me informed of the majority of the things that were of consequence; small items, he did not." ERA Motion, Exhibit F at 2-124 (Transcript of *Kern v. Tenneco* proceeding). Delpit contends, however, that he did not participate in the transactions at issue. He states that LeDoux was delegated complete authority over Kern's crude oil transactions and that LeDoux did not require or seek his approval before entering into individual contracts.

As an initial matter, we wish to point out that personal liability is not limited to instances where the individual participated in the specific transactions at issue; it may also be imposed where the individual authorized, approved, or ratified the policies underlying the transactions. In any event, as indicated in note 3 above, we are not called upon at this juncture to weigh the evidence in this case. While we are not convinced of his responsibility, we find that the ERA has made a *prima facie* case that Delpit was responsible for Kern's operations, including its crude oil transactions, and that personal liability based upon the tortious conduct theory may be warranted. Accordingly, he shall be joined to the Kern proceeding.

In addition, we shall consider whether other theories warrant holding Delpit personally liable for any refund obligation that is ultimately imposed upon Kern. We have previously noted that general principles of restitution based upon a party's unjust enrichment may form a basis for personal liability for a corporation's violation of DOE regulations. *See, e.g., ERA (RFB Petroleum, Inc.)*, 12 DOE ¶ at 85,132. This theory is based on the view

that it would be unconscionable and contrary to the public interest to allow corporate owners to retain benefits attributable to a corporation's regulatory violations, since if the payments had not been made to the shareholders they would be available to the corporation to satisfy any refund obligation. Liability is especially warranted where the owner was in a position to supervise the corporation's operations and prevent the regulatory violations. Although the ERA has not argued this theory of liability, the record contains sufficient evidence to make a *prima facie* case that Delpit should be held liable on this ground. Because of its large profits from the alleged regulatory violations, Kern was able to pay Delpit a large salary and the April 1981 dividend. It is therefore clear that Delpit profited enormously from the alleged violations, since otherwise his payments from Kern would undoubtedly have been less. We shall also consider the applicability of the related "trust fund doctrine" which holds that a shareholder that receives corporate distributions holds them in trust for payment of bona fide corporate debts. *Bayport Ref. Co.*, 15 DOE ¶ 84,009 at 87,075 (1987); *Grant v. Ross*, 27 S.W. 263 (Ky. 1896); *Bartlett v. Drew*, 27 N.Y. 589 (1874).[9]

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[9] Liability based upon the unjust enrichment and trust fund theories is not joint and several, but is secondary to the corporation's liability. Thus, personal liability on these theories will be present only if Kern is unable to satisfy, in full, any refund obligation that may be imposed in this case. Moreover, the amount of liability is limited to the amount by which a party was unjustly enriched or the amount of corporate distributions received by the party. As a rule, this amount does not include salaries paid at the going market rate. However, especially with closely held corporations, the fact that a payment is denominated a salary rather than a dividend is not conclusive, and we may inquire whether the amount reasonably reflects the legitimate services provided to the corporation.

3. Russell B. Newton, Jr.

It is undisputed that Newton owned three-fourths of Kern and was its Chief Executive Officer. The record indicates that during fiscal year 1980, Newton also received a salary of $———. In addition, the ERA states that it believes that three-fourths of the April 1981 dividend, $———, was received by Newton, and Newton has not denied this.

In response to the ERA's Motion to join him to the Kern proceeding, Newton submitted evidence that he had little to do with Kern's operations. Based upon this evidence, the ERA states that it will be unable to demonstrate that Newton had participated in, encouraged, or condoned the transactions that allegedly violated the price regulations. It therefore has concluded that the tortious conduct basis of liability is inapplicable to Newton. Accordingly, on April 26, 1988, the ERA asked to withdraw the portion of its Motion that seeks to join Newton to the Kern proceeding.

We agree with the ERA that there is insufficient evidence in the record to find that the tortious conduct theory of liability applies to Newton. Nonetheless, for the same reasons noted above with respect to Delpit, the record makes a *prima facie* case of liability based upon the unjust enrichment and the trust fund theories. We believe that he should be joined to this proceeding on these bases. While we are reluctant to join a party that the ERA no longer seeks to join, there is no evidence that the ERA considered these other theories of liability when it sought to withdraw its Motion to join Newton, and we believe it should have the opportunity of considering them. In addition, since the liability, if any is established, of LeDoux and Delpit may be greater if Newton is not joined, we find that fairness to them also requires joinder. Finally, it will be administratively more efficient to consider Newton's potential liability at this time, rather than have to

consider it at a later date if the ERA should eventually decide to recover a portion of any overcharges from Newton.

D. *Motion to Supplement Record & Correct Typographical Errors*

On October 13, 1987, the ERA filed a Motion in which it asks that it be allowed to supplement the record. The ERA seeks to submit a copy of Kern's November 1979 Form ERA-49. This form contains evidence concerning the volume of crude oil that was involved in a transaction that is at issue in this case. The ERA states that it was unable to obtain a copy of the form earlier. The ERA also asks that it be permitted to correct certain typographical errors in its Response to Kern's Statement of Objections. Kern has not responded to these requests.

The Form ERA-49 contains evidence relevant to a disputed issue in this proceeding, and Kern will be permitted to respond to this new evidence. The typographical errors that the ERA seeks to correct in its Response are minor and add nothing new of substance to the ERA's submission. Kern will not be prejudiced by permitting the ERA to supplement the record and correct its Response. Under these circumstances, we find that the ERA's requests should be granted.

II. *KERN'S MOTION TO STRIKE*

In its Response to the Statement of Objections, the ERA assumed that we would grant its Motion to amend the PRO to add the allegation that Kern violated the normal business practices rule. Kern argues that this assumption in the ERA's Response improperly requires it to reply to issues that have not yet been made a part of this proceeding, and therefore, on September 25, 1987, Kern moved that the ERA's Response be stricken. Kern notes, however, that if the ERA's Motion to Amend is granted, then we may properly accept the ERA's Re-

sponse in the form in which it was filed. Since we are granting the ERA's Motion to Amend, and since Kern will be allowed a full opportunity to respond to the amended PRO, Kern's Motion to Strike is now moot. Accordingly, it shall be dismissed.

III. *CONCLUSION & FILING SCHEDULE*

As set forth above, we are granting the ERA's Motion to amend the PRO to add, as an additional ground of liability, the allegation that Kern violated the normal business practices rule, and we are joining LeDoux, Delpit and Newton to the Kern proceeding. In this regard, we are also requiring the ERA to submit computations showing the amount that Kern's alleged overcharges would be if they were computed in the manner used in *Canal* and *Cities*. We are also granting the ERA's Motion to supplement the record and to correct for typographical errors. Kern's Motion to Strike the ERA's Response is being dismissed.

Kern shall serve a copy of its Statement of Objections and the ERA shall service a copy of its Response on LeDoux, Delpit and Newton within five days. They shall file a certificate of such service with this Office. The ERA shall submit the alternative overcharge computations referred to above within 20 days of the date of this Decision. LeDoux, Delpit and Newton may file Statements of Objections and Motions for Discovery and Evidentiary Hearing, and Kern may file a supplement to its Statement of Objections addressing the new issues raised by the amendment to the PR0. These filings shall be made no later than 40 days from the date of this Decision, or 20 days from the date the ERA files the alternative overcharge computations, whichever is later. The Respondents need not repeat in detail in their Statements of Objections the arguments that have already been made by Kern in this proceeding; they may be incorporated by reference. The ERA shall have 30 days

from the date that the last of the foregoing submissions is filed in which to file a consolidated Response.

It Is Therefore Ordered That:

(1) The Motion filed on September 17, 1987, by the Economic Regulatory Administration (No. KRZ-0522) to amend the Proposed Remedial Order that was issued to Kern Oil & Refining Company on March 31, 1987, and to join additional parties to the Kern proceeding is granted as set forth in Paragraphs (4) and (5) below.

(2) The Motion filed on October 13, 1987, by the ERA (KRZ-0524) to supplement the record and to correct typographical errors in its Response to Kern's Statement of Objections is granted.

(3) The Motion filed on September 25, 1987, by Kern (No. KRZ-0523) to strike the ERA's Response to its Statement of Objections is dismissed.

(4) The PRO issued to Kern is hereby amended as set forth below:

(a) The PRO is modified to indicate that Kern Oil and Refining Company is a corporation.

(b) The PRO is modified to add the allegation that the transactions at issue also violated the normal business practices rule, 10 C.F.R. § 210.62(c).

(5) Donald M. LeDoux, Larry D. Delpit and Russell B. Newton are hereby joined as respondents to the Kern PRO. Kern shall serve a copy of its Statement of Objections, and the ERA shall serve a copy of its Response on LeDoux, Delpit and Newton within five days.

(6) The ERA shall file a schedule showing alternative overcharge computations assuming that overcharges are alleged based on the theory that the transactions at issue circumvented the price regulations applicable to the resale of crude oil.

(7) Additional filings in this proceeding shall be governed by the schedule set forth in the foregoing Decision.

(8) This is an Interlocutory Order and is subject to review only upon the issuance of a final Remedial Order.

/s/ George B. Breznay
GEORGE B. BREZNAY
Director
Office of Hearings and Appeals

Date: Oct. 18, 1988